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GUINNESS ANCHOR MARKETING SDN BHD v. MAN SENG TRADING & MARKETING SDN BHD

COURT OF APPEAL, PUTRAJAYA
KAMALUDIN MD SAID JCA
SUPANG LIAN JCA
B AHMAD ZAIDI IBRAHIM JCA
[CIVIL APPEAL NO: N-02(W)-1764-08-2018]
26 NOVEMBER 2021

C **Abstract** – *An award for loss of profit, in a claim premised on a breach of contract, on top of what a party had earned through a business transacted while such contract was still subsisting, amounts to double compensation, unjust enrichment and places the party in a much better position than it would have been had the contract been performed.*

D ***CONTRACT:*** *Breach – Agreement – Distributorship agreement – Termination of – Claim for losses of goodwill, bank guarantee deposit profit and general damages – Entitlement to goodwill and loss of profit – Whether assessment of damages based on correct principles of law – Contracts Act 1950, s. 74*

E ***DAMAGES:*** *Assessment – Termination of distributorship agreement – Claim for losses of goodwill, bank guarantee deposit profit and general damages – Entitlement to goodwill and loss of profit – Whether assessment of damages based on correct principles of law – Whether there was double compensation and unjust enrichment*

F The appellant had entered into a distributorship agreement with Man Seng Marketing ('MSM') for the sale of the appellant's products to MSM. *Via* a goodwill agreement, the respondent purchased the assets of MSM including its goodwill. The appellant and the respondent then entered into a distributorship agreement where the respondent was the exclusive distributor of the appellant's products for specific territories. However, the appellant G terminated the distributorship agreement and the respondent claimed that the termination was unlawful and the appellant's other distributors had encroached into the respondent's territories. This prompted the respondent to commence a claim against the appellant, at the High Court, for (i) losses of goodwill, bank guarantee deposit and monthly and continual profit; and H (ii) general damages for breach of contract. The appellant, on the other hand, counterclaimed against the respondent for the sum of RM468,483.29 and for general damages following breach of contract. The High Court ('trial court') allowed the respondent's claim and ordered damages to be assessed by the Registrar. The appellant's counterclaim was allowed in part and the appellant's appeal to the Court of Appeal was dismissed. The matter was I remitted to the Registrar for damages to be assessed. The respondent's claim was allowed in part, namely for, losses of goodwill, profit for the years between 2002 and 2004 and property and plants in the sum of RM416,900,

RM500,885.97 and RM211,511.70, respectively. Dissatisfied, the parties appealed to the judge in chambers. The judge allowed (i) the appellant's appeal in part where the respondent's award (a) for loss of property and plant costs were set aside; and (b) for loss of goodwill and loss of profit were maintained; and (ii) the respondent's appeal in part where the claim for loss of profit for the years between 2005 and 2006 were allowed at the rate of RM27,000 per month, totaling to RM648,000. Hence, the present appeal by the appellant.

Held (allowing appeal in part with no order as to costs):

(1) The High Court Judge ('HCJ') misconstrued the order made by the trial court on liability. The HCJ took the view that the issues of entitlement to the various heads of damages had already been decided by the trial court on liability which was not correct. The trial court, on liability, dealt with the issue of liability only *ie*, the validity of the termination and the issues of damages were to be dealt with separately. The earlier courts did not have to and, in fact, did not decide on any of the damages to be awarded to respondent and that was why an assessment of damages had to be carried out. To interpret it the way the HCJ did would render the assessment meaningless or the entire assessment proceedings superfluous. (para 53)

(2) Pursuant to s. 74 of the Contracts Act 1950 ('Act'), when a contract has been broken, the party who suffers the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him, which naturally arose in the usual course of things from the breach or which the parties knew, when they made the contract, to be likely to result from the breach of it. The evidence showed that there was a causal link between the breach complained of, *ie*, the termination, and the loss claim. The loss of goodwill was recoverable as it was incurred and was in the contemplation of the parties when they entered into the distributorship agreement. The loss of goodwill was not too remote a consequence of the breach of contract by the appellant as, at the time they signed the distribution agreement, the goodwill agreement was within the appellant's knowledge. (paras 72 & 73)

(3) The loss of goodwill and loss of profits were two separate heads of damages. The loss of goodwill fell under s. 74 of the Act as it was within the contemplation of the appellant at all material times and the appellant was aware of this goodwill. The loss of profit was the losses suffered by the respondent due to the breach by the appellant of the distributorship agreement after the respondent and the appellant entered into the distributorship agreement. Even if the appellant took the stand that goodwill was wasted expenditure, which they denied, it was for the appellant to prove that such expenditure would not have been recouped/

regained. The respondent was entitled to claim for the goodwill amount of RM416,800 as the respondent had bought the goodwill of MSM as they were the dealers of the appellant. Due to the appellant's breach, the respondent had suffered losses directly as a result. (paras 75 & 76)

(4) The decision by the Deputy Registrar and the HCJ, in allowing the loss of profit claim for years 2002 to 2004 were indefensible. Firstly, there was no causation. The claim did not fall within s. 74 of the Act. Secondly, there was double compensation. During 2002 to 2004, when the distributorship agreement was still subsisting, the respondent was already making profit. To allow the loss of profit of RM500,885.97 on top of what the respondent had already earned through its business, at that time, was clearly double compensation, unjust enrichment and had placed the respondent in a much better position than it would have been had the contract been performed. However, if there was any claim for loss of profit arising from the unlawful termination, it must be for a claim that accrued after 9 July 2004, which the respondent's claim for loss of profit for the years 2005 to 2006 was allowed at the rate of RM27,000 per month for a total sum of RM648,000. The appellant had conceded to this amount when they abandoned the appeal. (para 86)

(5) The decision by the HCJ to affirm the Deputy Registrar's decision to allow loss of profit of RM500,885.97 for the years between 2002 and 2004, when the distributorship agreement was still in force, was plainly wrong. The decisions by the Deputy Registrar and the HCJ were contrary to legal principles and unsustainable at law. The judgment given for this amount ought to be set aside. (paras 87 & 89)

Case(s) referred to:

Amar Singh v. Chin Kiew [1960] 1 LNS 5 HC ***(refd)***
Bank Pertanian Malaysia Bhd v. Koperasi Permodalan Melayu Negeri Johor [2015] 9 CLJ 1 FC ***(refd)***
Bukit Unggul Golf And Country Resort Sdn Bhd v. Bukit Ringgit Holdings Sdn Bhd [2017] MLJU 1817 ***(refd)***
Bumiputra-Commerce Bank Bhd, Kuala Terengganu v. Chendering Development Sdn Bhd & Ors [2004] 1 CLJ 781 CA ***(refd)***
CCC Films (London) Ltd v. Impact Quadrant Films Ltd [1984] 3 All ER 298 ***(refd)***
Chaplin v. Hicks [1911] 2 KB 786 ***(refd)***
Chow Yee Wah & Anor v. Choo Ah Pat [1978] 1 LNS 32 PC ***(refd)***
Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***
Eikobina (M) Sdn Bhd v. Mensa Mercantile (Far East) Pte Ltd [1994] 2 CLJ 6 SC ***(refd)***
Far East Holdings Bhd & Anor v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Other Appeals [2018] 1 CLJ 693 FC ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Goo Sing Kar v. Dato' Lim Ah Chap & Ors [2013] 2 CLJ 936 CA ***(refd)***
Lee Ah Kow v. Roghini Loganathan & Anor [2017] 1 LNS 1468 HC ***(refd)***
Milik Perusahaan Sdn Bhd & Anor v. Kembang Masyur Sdn Bhd [2003] 1 CLJ 12 CA ***(refd)***
Nikmat Masyhur Sdn Bhd v. Kerajaan Negeri Johor Darul Ta'zim [2008] 9 CLJ 46 HC ***(refd)***

Perbadanan Kemajuan Negeri Selangor v. Selangor Country Club Sdn Bhd [2016] 8 CLJ 211 CA ***(refd)***
Rayner Segismond Balagut & Anor v. Saaid Abdullah & Ors [2011] 1 LNS 532 HC ***(refd)***
Tan Kuan Yau v. Suhindrimani Angasamy [1985] 1 CLJ 429; [1985] CLJ (Rep) 323 FC ***(refd)***
Tanjung Tiara Sdn Bhd v. Southwind Development Sdn Bhd [2011] 1 CLJ 105 CA ***(refd)***
Tham Cheow Toh v. Associated Metal Smelters Ltd [1972] 1 LNS 153 FC ***(refd)***
Ting Sieh Chung v. Hock Peng Reality Sdn Bhd [2012] 1 LNS 574 CA ***(refd)***
Topaiwah v. Salleh [1968] 1 LNS 161 FC ***(refd)***
UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785 FC ***(refd)***
Victoria Laundry v. Newman [1949] 2 KB 528 ***(refd)***
Watt v. Thomas [1947] AC 484 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 74

For the appellant - Choon Hon Leng & Loo Hui En; M/s Raja, Darryl & Loh
For the respondent - Krishna Dallumah & Yong Yoong Hui; M/s Krishna Dallumah & Indran

[Editor's note: Appeal from High Court, Seremban; Suit No: 22-161-2004 (overruled in part).]

Reported by Najib Tamby

JUDGMENT

Kamaludin Md Said JCA:

Introduction

[1] The appellant Guinness Anchor Marketing Sdn Bhd appeals against part of the decision of the Seremban High Court dated 31 July 2018 which had *inter alia*:

(i) dismissed the appellant's appeal against the respondent's loss of goodwill in the sum of RM416,900;

(ii) allowed the respondent's loss of profit of RM500,885.97 as follows:

(a) RM175,125.64 for the year 2002;

(b) RM175,125.64 for the year 2003; and

(c) RM150,634.69 for the year 2004.

(iii) allowed the respondent's appeal for claim of loss of profit in the sum of RM648,800.69 for the years 2005 to 2006.

[2] Initially, the respondent raised a preliminary objection to the appellant's appeal contending that the appellant only filed one notice of appeal despite there being two appeals and separate orders ie, encl. 12 and encl. 15. The appellant has failed to specify which order they are appealing against. The appellant reacted by abandoning their appeal on

A para. (iii) above and will confine their appeal against the decision in paras. (i) and (ii) only. Since the appeal in para. (iii) above, which order is made in respect of encl. 15, is not the subject matter of appeal anymore, the notice of appeal before this court is an appeal against one order ie, encl. 12 order. Hence, the preliminary objection has become academic.

B **[3]** On record, this is the second time this case came before the Court of Appeal of which the earlier Court of Appeal panel ("COA") had dismissed the appellant's appeal and the case was sent back to the High Court for an assessment of the damages. The assessment of damages was conducted by the Deputy Registrar of the High Court ("DR") whose decision was later
C appealed to the judge in chambers. The High Court Judge heard the appellant's appeal in encl. 12 dated 23 February 2017 and respondent's appeal in encl. 15 dated 6 March 2017 respectively and made his decision. The appellant is not satisfied with part of the decision of the High Court Judge hence this present appeal before this court.

D **Common Agreed Facts**

[4] The appellant entered into a distributorship agreement dated 3 February 1997 with Man Seng Marketing for the sale of the appellant's products to Man Seng Marketing. By a goodwill agreement dated 9 May
E 2002, the respondent purchased the assets of Man Seng Marketing including its goodwill ("goodwill agreement"). Subsequently, the appellant and the respondent entered into a distributorship agreement dated 1 July 2002 ("distributorship agreement"), whereby the respondent was the exclusive distributor of the appellant's products for specific territories as stated in the distributorship agreement.

F **[5]** By a notice of termination dated 9 July 2004, the appellant terminated the distributorship agreement. The respondent claimed that the termination was unlawful and there were encroachment of the respondent's exclusive territories by the appellant's other distributors.

G **[6]** The respondent then commenced this action against the appellant and claimed for the following:

(i) loss of goodwill for the sum of RM416,900;

(ii) loss of bank guarantee deposit for the sum of RM400,000;

H (iii) loss of profit for the sum of RM27,000 per month and continually; and

(iv) general damages for breach of contract.

[7] The appellant disputed the claim and filed a counterclaim against the respondent as follows:

I (i) the sum of RM468,483.29; and

(ii) general damages for breach of contract.

[8] After the trial, the High Court Judge allowed the respondent's claim and the damages to be assessed by the Registrar, and the appellant's counterclaim was allowed partially. Dissatisfied with the outcome, the appellant then appealed to the Court of Appeal and the respondent filed a cross-appeal. The appellant's appeal was dismissed and the cross-appeal was withdrawn.

[9] The matter was subsequently remitted to the Registrar for damages to be assessed. The Deputy Registrar allowed the respondent's (plaintiff) claim in part as follows:

(i) the loss of goodwill in the sum of RM416,900;

(ii) the loss of profit in the sum of RM500,885.97 consisting of:

  (a) RM175,125.64 for the year 2002;

  (b) RM175,125.64 for the year 2003; and

  (c) RM150,634.69 for the year 2004.

(iii) loss of property and plant costs in the sum of RM211,511.70;

(iv) interest at the rate of 8% per annum until realisation; and

(v) costs of RM27,000.

[10] Dissatisfied with the Registrar's decision, both filed appeals (encls. 12 and 15) to the judge in chambers.

[11] On 31 July 2018, the learned judge made the following orders;

(i) The appellant's appeal *via* encl. 12 was allowed in part whereby;

  (a) The respondent's claim for loss of property and plant costs as awarded by the Deputy Registrar to the respondent is set aside;

  (b) The respondent's claim for loss of goodwill for the sum of RM416,900 and loss of profit for the sum of RM500,885.97 as awarded by the Deputy Registrar is maintained;

(ii) The respondent's appeal *via* encl. 15 was allowed in part whereby;

  (c) The respondent's claim for loss of profit for the years 2005 to 2006 was allowed at the rate of RM27,000 per month for a total sum of RM648,000.

[12] Dissatisfied with the decision of the High Court Judge, the appellant then filed this appeal on 27 August 2018. The respondent did not file an appeal, nor a cross-appeal.

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Grounds Of Appeal

[13] The appellant has set out various grounds of appeal in the memorandum of appeal and states that the High Court Judge had erred in fact and/or in law as follows:

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(i) by not recognising that the earlier decisions of the High Court and Court of Appeal were only confined to the issue of liability on the validity (or otherwise) of the termination of the distributorship agreement, but did not deal with the issue of nature and extent of damages that the respondent was entitled to. In fact, the learned judge had also departed from the findings of the Court of Appeal which the learned judge found to have been made by the Court of Appeal;

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(ii) by relying on evidence given by the appellant's witness who allegedly admitted that the respondent was entitled to the loss of bank guarantee deposit, loss of goodwill, loss of monthly profit of RM27,000 when such matter was questions of law that the court was required to determine;

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(iii) by finding that Registrar did not err when she made a finding that the respondent is entitled to the loss of goodwill of RM416,900 although the goodwill agreement was between the respondent and Man Seng Marketing, which the appellant was not privy to, and before the respondent entered into the distributorship agreement with the appellant;

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(iv) in finding that the Registrar did not err when she made a finding that the appellant is liable to pay the respondent for loss of goodwill on the ground that the appellant had knowledge of the goodwill agreement when the correct approach should be based on s. 74 of the Contracts Act 1950, where the respondent has to prove the causal link and actual loss, both of which the respondent has failed to prove;

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(v) failing to consider that the distributorship agreement has provisions on expiry and termination in which case there was effectively no binding obligations on the parties to allow the distributorship agreement to continue for any specific period of time;

(vi) by allowing the respondent's claims for both loss of goodwill and loss of profit as that amounted to double compensation and unjust enrichment to the respondent;

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(vii) in finding that the Registrar did not err when she made a finding that the respondent is entitled to the loss of profit of RM500,885.97 for the period between 2002 and 2004 when such loss, if any, was not caused by the termination of the distributorship agreement;

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(viii) in failing to appreciate that the respondent had been conducting business and generating income under the distributorship agreement between 2002 and 2004 prior to its termination and therefore to allow a claim for loss of profit between 2002 and 2004 amounted to double compensation and unjust enrichment to the respondent;

(ix) in failing to find that the respondent had failed to prove actual loss of its claim between 2002 and 2004;

(x) in failing to find that the respondent has failed to discharge its burden of proof to prove its claim for a monthly loss of profit of RM27,000 for 24 months between the year 2005 and 2006 with a total of RM648,000; and

(xi) failing to find that the evidence purportedly put forward by the respondent to prove its monthly loss of profit in the sum of RM27,000 was unsubstantiated, incredible and unreliable.

[14] Given that the appellant has since abandoned the ground of appeal as in para. [10] above, in summary, the appellant's dissatisfaction against the decision of the High Court is whether the respondent is entitled to the respondent's goodwill and the loss of profits between 2002 and 2004 awarded by the High Court.

Appellate Intervention

[15] This appeal concerns the assessment of damages by the DR and the High Court Judge. In considering the award for general damages, the court will not ordinarily intervene with the findings and award of the trial court unless the award or findings are clearly wrong or erroneous.

[16] The rules as to damages can in the nature of things only be approximately just, and that they have to be worked out. The assessment which the courts have made over the years form some guide to the kind of figure which is proper and which the appellate court will follow in the light of the special facts of each particular case (*Topaiwah v. Salleh* [1968] 1 LNS 161; [1968] 1 MLJ 284 at p. 285 (FC). The specific finding of facts by the Registrar as a trier of facts should not be disturbed by the appellate court such as the learned judge herein unless that finding was plainly wrong (*Ting Sieh Chung v. Hock Peng Reality Sdn Bhd* [2012] 1 LNS 574; [2013] 2 MLJ 90 CA; *Lee Ah Kow v. Roghini Loganathan & Anor* [2017] 1 LNS 1468; [2017] MLJU 1656).

[17] In the present case, both the DR and the High Court Judge allowed the loss of goodwill of RM416,800 and the loss of profit of RM500,885.97 for the year 2002 to 2004. It cannot be disputed that, these are concurrent findings by the DR and the High Court Judge and thus there must be shown an exceptional circumstance to warrant appellate interference. The court will not disturb concurrent findings (*Goo Sing Kar v. Dato' Lim Ah Chap & Ors* [2013] 2 CLJ 936; [2013] 3 MLJ 374).

[18] However, if an appellant can sufficiently demonstrate to a conviction that a serious error of principle has occurred at both the lower tiers of the High Court, this court will have no hesitation; and indeed duty-bound to correct the resultant error (*Milik Perusahaan Sdn Bhd & Anor v. Kembang Masyur Sdn Bhd* [2003] 1 CLJ 12; [2003] 1 MLJ 6).

[19] The case of *Tan Kuan Yau v. Suhindrimani Angasamy* [1985] 1 CLJ 429; [1985] CLJ (Rep) 323; [1985] 2 MLJ 22 held *inter alia* that if the court is satisfied or convinced that the judge has acted upon wrong principles of law then it is justified in reversing; indeed, it is its duty to reverse the finding of the trial judge (*Bukit Unggul Golf and Country Resort Sdn Bhd v. Bukit Ringgit Holdings Sdn Bhd* [2017] MLJU 1817). The recent Federal Court's case of *Far East Holdings Bhd & Anor v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Other Appeals* [2018] 1 CLJ 693; [2018] 1 MLJ 1 held that assessment of damages on wrong principles is always a ground to set aside and re-assess an award of damages. Misappropriation of law in assessment of damages substantially affected the rights of parties.

[20] The accepted principles are always based on the plainly wrong test. The current case of *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453; [2015] 2 MLJ 441, held *inter alia* that the principles on which an appellate court could interfere with findings of fact by the trial court is "plainly wrong test". A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence (*Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1; *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785 (FC); *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 1 LNS 32; *Watt v. Thomas* [1947] AC 484).

The High Court Decision

[21] The High Court Judge acknowledged that previously on 20 September 2010, the High Court after full trial in an action brought by the respondent (plaintiff) against the appellant (defendant) for unlawful termination of distributorship agreement dated 9 July 2004 and counterclaim by the defendant had adjudged that the defendant do pay damages to the plaintiff to be assessed by the DR. The plaintiff was also awarded interest of 8% per annum on the damages to be paid from 1 July 2004 until full settlement thereof and costs of RM50,000. In the same order, the plaintiff is to pay the defendant the sum of RM688,483.29 with interest of 8% per annum from 1 July 2004 until full settlement. The claim for general damages was dismissed and costs of RM50,000 for defendant's counterclaim. The defendant appealed to the COA and on 25 February 2013, COA dismissed the appeal with costs of RM20,000 and the damages are to be assessed by the Registrar. The DR then proceeded to assess the damages and loss as directed by the COA. In the proceeding before the DR, the plaintiff and the defendant each produced two witnesses to give evidence.

[22] The subject matter of appeal before the High Court Judge is against the decision of the DR in her assessment of damages delivered on 22 February 2017. The plaintiff appealed against part of the DR's decision in encl. 15 and the defendant appealed against the whole of the DR's decision in encl. 12.

[23] At para. 6 of the grounds of judgment, the High Court Judge having heard the appeals, decided and allowed the plaintiff's appeal for loss of profit for the years 2005 and 2006 at the rate of RM27,000 per month for two years (RM648,000). The plaintiff's claim for loss of property and plant was allowed but the plaintiff's claim for goodwill for the sum of RM416,900 and loss of profit for cumulative sum of RM500,885.97 for the years 2002, 2003 and 2004 was dismissed.

[24] At para. 8, the High Court Judge referred to the DR's judgment which found *inter alia* that the termination of the distribution agreement on 9 July 2004 by the defendant is unlawful for breach of cl. 11.1.3 of the agreement for failure to give 30 days' notice. The DR held that the plaintiff is entitled to claim the losses ie, bank guarantee deposit of RM400,000, goodwill of RM416,900 and loss of RM27,000 per month continually.

[25] The grounds of decision of the High Court Judge appears at para. 11 onwards. The defendant had submitted that the termination of the distributorship agreement had not caused any loss to plaintiff's goodwill of RM416,900. The plaintiff failed to prove such loss and that the award of both loss of profit and goodwill is tantamount to double compensation and unfair to the defendant.

[26] The High Court Judge did not agree with the defendant's submission. The High Court was of the opinion that the goodwill agreement is between the plaintiff and Man Seng Marketing to purchase the assets and operation of Man Seng Marketing which is within the defendant's knowledge when the defendant and the plaintiff entered into the distributorship agreement. This evidence comes from the defendant's witnesses Loo Seng Yoong and Te Lian Sim. Based on the evidence, the High Court Judge concluded that the defendant has breached the agreement by failing to give 30 days' notice to the plaintiff under cl. 11.1.3 of the agreement. The High Court Judge held that the plaintiff is entitled to claim the loss of bank guarantee deposit of RM400,000, goodwill of RM416,900 and loss of RM27,000 per month continually, and this was admitted by the defendant's witness, Loo Seng Yoong.

[27] At para. 13 of the judgment, the High Court Judge was also of the opinion that his decision which found the plaintiff is entitled to the claim was confirmed by the COA when the defendant's appeal was dismissed given that the same arguments were placed before the COA. Hence, the issue of loss of goodwill is a non-issue and the plaintiff was rightly awarded that loss. The High Court Judge found there is no reason to disturb the DR's decision in allowing the loss of goodwill of RM416,900. That decision was affirmed by the High Court Judge.

[28] At para. 19, the High Court Judge considered the plaintiff's claim for loss of profit of RM500,885.97. The defendant had submitted that the loss of profit must relate to the loss of future profit and not to past profit because the plaintiff had benefited from the actual profit in the past. Further, the plaintiff gained double compensation after benefiting from the actual profit and again claiming for loss of profit. The claim should not be allowed.

[29] The High Court Judge did not agree with the defendant and was of the opinion that the calculation of profit per month in the sum of RM27,000 is based on the evidence of plaintiff's witness, Chiam Tou Kiang who prepared the profit forecast and was supported by another plaintiff's witness, Koong Po Leng. Whereas, the defendant's witness, having agreed that there is nothing wrong with the profit forecast, did not give any evidence to rebut the plaintiff's evidence on the calculation and the profit forecast.

[30] The finding of loss of profit at RM27,000 per month found by the High Court Judge was also confirmed by the COA. Therefore, the High Court Judge was also of the view that the calculation derived at of the amount which the plaintiff is entitled to, is settled.

[31] The High Court Judge agreed with the finding of the DR for the loss of profit of RM500,889.97 for the years 2002, 2003 and 2004 and affirmed the decision of the DR.

[32] At para. 21 of the judgment, the High Court Judge considered the plaintiff's claim for RM648,000 for the years 2005 and 2006. The DR disallowed this claim because the claim was too remote. The plaintiff submitted that it should be awarded the loss of profit until the month of June 2006 at the least. The defendant submitted that there is no evidence tendered as proof of the claim as a result of breach of agreement by the defendant.

[33] The High Court Judge agreed with the plaintiff because he found evidence from the plaintiff's witnesses on how the calculation of RM27,000 per month for loss of profit was derived at, which the defendant had failed to rebut it. It is the plaintiff's argument that since the distributorship agreement was an automatic renewal for the period of two years from 1 July 2004 until 30 June 2006, the loss of profit if any, should be allowed until 30 June 2006.

[34] The High Court Judge was of the opinion that the loss of profit for RM27,000 per month and continually has been confirmed by the COA and the defendant's appeal was dismissed by the COA. Based on this fact, the High Court Judge made his finding that the DR's decision in disallowing the plaintiff's claim is wrong and held that the plaintiff is entitled to the claim. The plaintiff's claim was allowed ie, the claim for loss of profit for the year 2005 and 2006 (from 1 July 2004 to 30 June 2006) for the sum of RM648,000 (RM27,000 x 24 months).

Appellant's Submissions

[35] The appellant contended that in awarding damages (and quantum) to the respondent, the High Court Judge has committed an error of law, and was plainly wrong based on the following principles which the High Court Judge has failed to follow:

(i) The loss or damages claimed must fall within s. 74 of the Contracts Act 1950 and caused by the breach complained of. Otherwise, no claim could be made.

(ii) The measure of damages must not put the respondent in a better position than it would have been had the distributorship agreement been performed and not breached. The respondent cannot be unjustly enriched or enjoy a windfall.

(iii) The quantum of damages must be proven with credible and substantiated evidence. The burden of proving damages remains firmly on the respondent.

[36] It is the appellant's submission that if the court below is shown to have failed to follow and apply any of these principles, then the decision made thereby falls within the "plainly wrong" category and ought to be set aside.

The Errors

[37] The appellant contended that the High Court Judge misconstrued the order made by the trial court on liability. The High Court Judge took the view that the issues of the entitlement to these various heads of damages had already been decided by the trial court at the liability stage. The appellant submitted that that is not correct as the trial court on liability dealt with the issue of liability only and issues on damages were not within the purview. That was why an assessment of damages had to be carried out. To interpret it the way the High Court Judge did would render the assessment meaningless.

Loss Of Goodwill

[38] The loss of goodwill is effectively the amount that the respondent paid Man Seng Marketing under a goodwill agreement dated 9 May 2002 between them. This effectively was the cost that the respondent incurred in acquiring the business of Man Seng Marketing.

[39] The distributorship agreement had not come into existence.

[40] The amount paid by the respondent to Man Seng Marketing was cost that the respondent had to incur in order to get into this business and to make profit thereafter.

[41] To allow the respondent to recover this sum would contravene the established principles set out above:

(i) what the respondent paid Man Seng Marketing had nothing to do with the breach, and could not have been caused by the breach because the breach occurred more than two years after the respondent has paid Man Seng Marketing. Thus that could not be classified as a loss arising or caused by the breach;

(ii) had the distributorship agreement been performed and not breached, the respondent would not be reimbursed the amount that it paid Man Seng Marketing anyway. To allow that now will put the respondent in a better position than it would have been had the contract been performed. This is not allowed; and

(iii) the amount has never been proven. The respondent could not just adopt an amount that it agreed with an unrelated third party more than two years before. The respondent has to prove its actual loss and the respondent has failed to discharge that burden of proof.

Loss Of Profit (2002-2004) – RM500,885.97

[42] This loss of profit is claimed by the respondent during the period of distributorship agreement still subsisting. However, the termination (which was the breach complained of) only took place in July 2004.

[43] To allow this "loss of profit" for 2002 to 2004 is clearly wrong in law:

(i) at that time, there was no breach. This "loss", even if suffered, could not have been caused by the breach. There was no causal link;

(ii) during that period, the distributorship agreement was in force and the respondent made its profit therefrom. Therefore, there was no "loss". The respondent is now claiming further profit on top of what it had already earned. The respondent is not entitled to extra profit under the terms of the distributorship agreement;

(iii) as such to allow this claim would amount to double compensation and to give the respondent extra profit that is clearly unsubstantiated, incredible and lacking in basis, especially as the respondent had failed to adduce or disclose the source documents. The burden was on the respondent and the latter has failed to discharge that burden.

[44] In conclusion, the appellant submitted that the court below has erred on both principle of law and quantum when allowing loss of goodwill and loss of profits to the respondent. Hence, this appeal satisfied the plainly wrong test and appellate intervention is warranted. The appeal should be allowed with costs.

Respondent's Submission

[45] The respondent contended that the appellant was well aware of the existence of the goodwill agreement and its purpose, which was to take over assets and operation of Man Seng Marketing including the exclusive distributorship. The trial judge in fact allowed the loss of goodwill which was later affirmed by the COA.

[46] The loss of goodwill therefore falls under the second limb of s. 74 of Contracts Act 1950 as it was within the contemplation of the appellant at all material times and the latter was aware of the goodwill.

[47] It was submitted that the appellant by allowing other distributors to encroach into the respondent's exclusive territory would defeat the sole distributions granted to the respondent which led to the respondent's purchasing the goodwill of Man Seng Marketing.

[48] Therefore, there is no error by the High Court Judge in awarding the loss of goodwill.

[49] On the issue of loss of profit for 2002 to 2004 amounting to RM500,885.97, the respondent submitted that it suffered loss in 2002 to 2004 due to the appellant's failure to give purchase targets on time and by allowing other distributors to encroach on the respondent's exclusive territory. Hence, the loss of profit for 2002 to 2004 is reasonably foreseeable as liable to result from the breach.

[50] Evidence was led that as a result of the appellant's breach, the respondent incurred losses and this figure is reflected in the respondent's audited financial statements. It was submitted that if the appellant had not breached the agreement, the respondent would have gained around RM27,000 per month. The court awarded this figure as this is the actual loss suffered by the respondent.

[51] In conclusion, the respondent submitted that the appellant has failed to show that the High Court Judge erred in arriving at his decision. In such circumstances, the respondent prayed that the appeal be dismissed with costs.

Decision Of This Court

[52] The issue before this court is whether the assessment of damages by the High Court Judge which is the subject matter of appeal was based on wrong principles which warrant this court to set aside that part of the decision and allow the appeal by the appellant.

[53] Based on the record, the High Court Judge has misconstrued the order made by the trial court on liability. The High Court Judge took the view that the issues of the entitlement to these various heads of damages had already been decided by the trial court on liability which is not correct. The trial court on liability dealt with the issue of liability only ie, the validity of the

termination and issues on damages were to be dealt with separately. The earlier courts did not have to and in fact did not decide on any of the damages to be awarded to the respondent and that was why an assessment of damages had to be carried out. To interpret it the way the High Court Judge did would render the assessment meaningless or the entire assessment proceedings superfluous.

[54] The order of the High Court clearly pronounced as follows:

> MAKA ADALAH DIPERINTAHKAN bahawa Defendan hendaklah membayar kepada Plaintif gantirugi (semua termasuk) yang akan ditaksirkan oleh Penolong Kanan Pendaftar berserta dengan faedah pada kadar 8% setahun ke atas gantirugi yang perlu dibayar kepada Plaintif ...

[55] Further, in the grounds of judgment of the trial judge at the High Court, clearly stated that:

> 2. Kedua-dua pihak bersetuju untuk penentuan isu liabiliti dalam guaman ini dan ganti rugi ditaksirkan oleh Timbalan Pendaftar.

[56] In the assessment of damages, the DR allowed the loss of goodwill of RM416,800 and the loss of profit of RM500,885.97 for the year 2002 to 2004. On appeal to the High Court, the DR's order was affirmed by the High Court Judge. These are the concurrent findings by the DR and the High Court Judge and thus, the appellant has the duty to show exceptional circumstances to warrant this court to interfere otherwise the general principle would apply that the appellate court will not disturb concurrent findings (*Goo Sing Kar v. Dato' Lim Ah Chap & Ors* [2013] 2 CLJ 936; [2013] 3 MLJU 374 (CA); *Milik Perusahaan Sdn Bhd & Anor v. Kembang Masyur Sdn Bhd* (*supra*).

[57] The High Court Judge in awarding the loss of goodwill gives his reason that goodwill agreement between the respondent and Man Seng Marketing is within the appellant's knowledge and that the respondent's entitlement to loss of goodwill of RM416,800 has been confirmed by the COA. The award on loss of profit for the 2002 to 2004 in the sum of RM500,885.97 is based on the sum of RM27,000 per month which is supported by the evidence of respondent's witnesses. This too has been confirmed by the COA.

[58] In respect of the principles on assessment of damages, the Supreme Court case of *Eikobina (M) Sdn Bhd v. Mensa Mercantile (Far East) Pte Ltd* [1994] 2 CLJ 6; [1994] 1 MLJ 553 provided guidance as follows:

> *After liability on a contract is established and when it comes to assessment of damages, two questions are always involved. The first is that no compensation can be awarded for damage that is too remote and the second is that in assessing damage that is not too remote, the correct measure of damages must be adopted, ie, the correct and usual principles of quantifying the monetary compensation must be employed.*
>
> *The courts have long recognised that a contract breaker could not be liable for all consequences which flow naturally from a breach of contract and that they must draw a line somewhere, otherwise the consequences would be, inter alia, ruinous to the*

contract breaker. Thus, certain of such ensuing consequences would be regarded as too remote to be claimable, 'not perhaps on ground of pure logic but simply for practical reasons', to quote a dictum of Lord Wright in Liesbosch Dredger v. Edison SS 1 made in a similar vein.

The meaning of remoteness of damage was finally settled in the landmark case of Hadley v. Baxendale 2 as follows:

When two parties have made a contract which one to them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may be fairly and reasonably considered either arising naturally, i.e. according to the usual course of things from such breach of contract itself or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it ...

(emphasis added)

[59] The rule in regard to remoteness of damage enunciated in *Hadley v. Baxendale* is found in s. 74 of the Contracts Act 1950. Section 74 provides that:

74. Compensation for loss or damage caused by breach of contract

(1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

(2) such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

(emphasis added)

[60] Based on this principle, the respondent's claim for damages must fall within either limb, in particular it must not be too remote. There must be a causal link shown between the breach complained of (which is the termination in this case) and the loss claimed. As the respondent's cause of action was premised on breach of contract, the measure of damages for such cause of action is that the respondent should be put in a position as if the distributorship agreement had been performed, and not any better. The respondent cannot be put in a better position than if there was no breach.

[61] This principle is explained by the of Federal Court in *Bank Pertanian Malaysia Bhd v. Koperasi Permodalan Melayu Negeri Johor* [2015] 9 CLJ 1; [2015] 6 MLJ 149, in these terms:

[100] ... In the circumstances of the case, all that the Koperasi is entitled to is to be put in a position as if the breach had not occurred. If the breach had in any way resulted loss to the Koperasi, damages would have to be assessed, so far as money could do so, to compensate the Koperasi by placing it in the same position as if the breach had not occurred.

A *[101] The above proposition was adopted by Parke R in Robinson v. Harman [1843 - 60] All ER Rep 383 at p 385 when he said 'where a party sustain a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed'. If the Koperasi is to be put in a better position than it would have been if had there been no breach by the bank in prematurely uplifting the fixed deposit, then it would be*
B *contrary to the principle enunciated in established authorities (see Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777; Koufos v. C Czarnikow Ltd [1969] 1 AC 350; and Hadley v. Baxendale (1854) 9 Ex 341; 156 ER 145).* (emphasis added)

[62] The respondent must prove actual loss for each and every head of
C claim and if actual loss is not proven, then the claim ought to be dismissed or only nominal damages could be granted. This well-established principle was recently restated by the Court of Appeal in *Perbadanan Kemajuan Negeri Selangor v. Selangor Country Club Sdn Bhd* [2016] 8 CLJ 211; [2017] 2 MLJ 819, where it held that:

D *[51] As to damages, it is settled law that in order for SCCSB to succeed in its claim SCCSB must show that the loss and damages is due to the breach of contract by PKNS. Once that is established, SCCSB has the additional burden of proving the damages. The law on the recovery of damages has been succinctly enunciated by Ramly Ali J (now FCJ) in PB Malaysia Sdn Bhd v. Samudra (M) Sdn Bhd [2009] 7 MLJ 681 at p 697. It may be summarised into two main principles:*
E

(a) the burden of proof is on the party seeking the claim to prove the facts and the amount of damages (Hock Huat Iron Foundry (suing as a firm) v. Naga Tembaga Sdn Bhd [1999] 1 MLJ 65 (CA); Bonham-Carter v. Hyde Park Hotel Ltd (1948) 64 TLR 177; Popular Industries Limited v. Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360 and Sony Electronics
F *(M) Sdn Bhd v. Direct Interest Sdn Bhd [2007] 2 MLJ 229 (CA)); and*

(b) the damages must be proved with real or factual evidence. Mere particulars, summaries, estimations or general conclusions will not suffice (Lee Sau Kong v. Leow Cheng Chiang [1961] 1 MLJ 17 (CA)).

(emphasis added)

G

[63] In our considered view, these are the three key principles of law that the DR and High Court Judge must adhere to and apply in assessing the respondent's claim for damages. Failure to do so would be plainly wrong and render the finding or decision made untenable at law.

H *Loss Of Goodwill (RM416,800)*

[64] The appellant's argument is that the loss of goodwill is the amount that the respondent paid Man Seng Marketing. This amount had to be paid by the respondent to Man Seng Marketing in order to acquire its business, without which the respondent would not even be in a position to enter into the
I distributorship agreement with the appellant. Even if the distributorship agreement was not breached and parties continued to perform the distributorship agreement, the respondent would never be reimbursed

(whether by the appellant or anybody else) the amount that the respondent paid to Man Seng Marketing ie, the loss of goodwill. As such, the loss of goodwill is essentially the respondent's business cost, a cost that the respondent needed to spend in order to get into the business and to earn profit.

[65] In resisting the appellant's appeal, the respondent referred to the amount in the schedule of assets of the goodwill agreement and the receipt of payment for the goodwill. The payment voucher states the said payment was for "purchase of distributorship of GAMSB (the appellant herein) for Districts of Jempol, Kuala Pilah and Jelebu". The respondent contended that the appellant was well aware of the existence of the goodwill agreement and the purpose of the goodwill agreement was to take over assets and operation of Man Seng Marketing including the exclusive distributorship.

[66] The respondent submitted that during the main trial, Mr Loo Seng Yoong (SD1), the regional sales manager also was the witness to the distribution agreement, had stated that there was discussion between parties in his Seremban office. He was thus aware that the respondent had taken over the assets and operation of Man Seng Marketing and it included the stocks recently purchased by Man Seng Marketing from the appellant. It is also in evidence that the deposit paid by Man Seng Marketing to the appellant was returned by the appellant and replaced with the respondent's deposit and a separate account in the name of the respondent was opened. Even the signage at the premises belonging to Man Seng Marketing was changed by the appellant to that of the respondent.

[67] During the assessment of damages, although initially SD1 denied that the appellant had knowledge of the purchase of goodwill and the termination was based on the fact that the respondent failed to meet the sales target however, when it was put to him that his evidence in the witness statement differed from his evidence during cross-examination at the main trial and his evidence had been rejected by the judge in the main trial, SD1 then admitted that he had knowledge of the goodwill agreement. The respondent reproduced the evidence of SD1 during the cross-examination found in encl. 18 pp. 86 to 87 CBR as follows:

52. Q: Bundle G page 34, line 25, 1 read again the question that I asked you during the hearing were you aware there was an agreement between Man Seng Marketing and Plaintiff to take over the assets and operations of Man Seng Marketing, your answer I was aware of it.

A: Yes.

55. Q: And that is the deposit paid by Man Seng Marketing isn't it? The cash deposit, do you remember, do you remember there was a cash deposit. So I am putting it to you your question at 8, the defendant has no knowledge of it has nothing to do with the purchase of goodwill anyway is wrong

because you had knowledge question & answer 8, so your answer is wrong you had knowledge of the agreement, you had knowledge of the purchase of the goodwill being aware of the agreement, correct?

A: In a way yes.

[68] The evidence showing the respondent was aware of the goodwill agreement was further confirmed by Mr Te Lian Sim (SD2). The respondent reproduced the evidence of SD2 during the cross-examination found in encl. 18 pp. 88 CBR as follows:

24. Q: You agree. In fact Mr Loo has informed that court that after the agreement they were aware and when and on the 1 July 2002 the Defendant signed the new agreement with the Plaintiff after the sale of the goodwill, correct? Yes, you are aware of that or not aware?

A: As per the Plaintiffs' statement.

[69] It is not disputed that Man Seng Marketing previously was the exclusive distributor for the appellant covering the districts of Kuala Pilah, Bahau and Jelebu of Negeri Sembilan. Man Seng Marketing and the respondent then entered a goodwill agreement whereby the respondent took over the whole business and operation of Man Seng Marketing including the sole distributorship of the appellant. By allowing their other distributors to encroach into the respondent's exclusive territory, the appellant had thus defeated the sole distributions granted to the respondent, which had led to the respondent purchasing the goodwill of Man Seng Marketing.

[70] The High Court Judge in his judgment at para. 12 found that the goodwill agreement is within the appellant's knowledge for the purpose of entering into the distributorship agreement with the respondent. Based on the evidence of witnesses and the purpose of entering into the distributorship agreement for exclusive distributorship right, in our opinion, it cannot be said that the High Court Judge has fallen into error in his finding of facts. In other words, it is correct for the respondent in his submission to contend that the distributorship agreement was subject to the respondent applying and obtaining the approval from appellant which the respondent did and the appellant was aware of the purchase of goodwill. Thus, the appellant's argument that the appellant is not privy to the goodwill agreement and has no knowledge of the goodwill agreement as it pre-exists the distributorship agreement cannot hold water.

[71] The fact that the appellant had allowed other distributors to encroach into the respondent's exclusive territory was not disputed. It is a specific finding made by the High Court Judge in the main trial which the matter later went on for assessment of damages before the DR and the DR's decision is affirmed by the High Court Judge.

[72] Section 74 of Contracts Act 1950 says that when a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. We are satisfied that the evidence shows there is a causal link between the breach complained of (which is the termination in this case) and the loss claimed. In the result, the loss of goodwill is recoverable as it was incurred and was in the contemplation of parties when they made entered into the distributorship agreement.

[73] The loss of goodwill is not too remote a consequence of the breach of contract by the appellant as at the time they signed the distribution agreement, the goodwill agreement was within the appellant's knowledge. In *Victoria Laundry v. Newman* [1949] 2 KB 528, Asquith LJ delivering the judgment of the English Court of Appeal, stated as follows:

> *(3) What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties or at all events, by the party who later commits the breach.*
>
> *(4) For this purpose, knowledge "possessed" is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know the "ordinary course of things" and consequently what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the "first rule" in Hadley v. Baxendale (2). But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the "ordinary course of things," of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the "second rule" so as to make additional loss also recoverable.*
>
> *(6) Nor, finally, to make a particular loss recoverable, need it be proved that upon a given state of knowledge the defendant could, as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough if he could foresee it was likely so to result. It is indeed enough, to borrow from the language of Lord du Parcq in the same case, at page 158, if the loss (or some factor without which it would not have occurred) is a "serious possibility" or a "real danger." For short, we have used the word "liable" to result. Possibly the colloquialism "on the cards" indicates the shade of meaning with some approach to accuracy*.
>
> (emphasis added)

See also: *Bumiputra-Commerce Bank Bhd, Kuala Terengganu v. Chendering Development Sdn Bhd & Ors* [2004] 1 CLJ 781; [2004] 1 MLJ 657; *Nikmat Masyhur Sdn Bhd v. Kerajaan Negeri Johor Darul Ta'zim* [2008] 9 CLJ 46; *Rayner Segismond Balagut & Anor v. Saaid Abdullah & Ors* [2011] 1 LNS 532; [2012] 7 MLJ 55.

[74] The distribution agreement was entered on 3 February 1997 and the respondent then purchased the goodwill of Man Seng Marketing through goodwill agreement dated 9 May 2002 in order to obtain the distributorship agreement between the appellant and Man Seng Marketing. This is clearly spelt out in cl. 2 of the goodwill agreement that the goodwill agreement is conditional upon Man Seng Marketing (vendors) securing the conclusion of a new distributorship agreement between the appellant and the respondent for the exclusive distribution rights.

[75] We agree with the respondent that the loss of goodwill and loss of profits are two separate heads of damages. The loss of goodwill falls under s. 74 of the Contracts Act 1950 as it was within the contemplation of the appellant at all material times and the appellant was aware of this goodwill. The loss of profit was the losses suffered by the respondent due to the breach by the appellant of the distributorship agreement after the respondent and the appellant had entered into the distributorship agreement. Further, even if the appellant takes the stand that goodwill is wasted expenditure, which they denied, it is for the appellant to prove that such expenditure would not have been recouped/regained as explained in *CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1984] 3 All ER 298, per Hutchison J held that:

> *(2) Where the plaintiff claimed for wasted expenditure when he had been prevented by the defendant's breach of contract from exploiting the chattel or right contracted for and it was thereby impossible to determine whether he would have recouped his expenditure if he had been able to exploit the chattel or right, the onus was on the defendant to show that the expenditure would not have been recouped (eg by showing that the plaintiff would have lost money if he had been able to exploit the contract) and not on the plaintiff to show that he would have recouped the expenditure. Since the onus of proving that the plaintiffs would not have recouped their outlay of $12,000 if they had received the tapes and exploited the films lay on the defendants, who had not discharged that burden, the plaintiffs were entitled to judgment.*
>
> (emphasis added)

[76] Thus, it is our considered view that the respondent is entitled to claim for the goodwill amount of RM416,800 as the respondent had bought the goodwill of Man Seng Marketing as they were the dealers of the appellant. Due to the appellant's breach, the respondent had suffered losses directly as a result.

Loss Of Profit (2002-2004) - RM500,885.97

[77] The loss of profit in the sum of RM500,885.97 is comprised of the following:

(i) year 2002 - RM175,125.64;

(ii) year 2003 - RM175,125.64;

(iii) year 2004 - RM150,634.69.

[78] The respondent submitted that the loss of profit suffered by the respondent for 2002 to 2004 was because of the appellant having breached the agreement by failure to give purchase targets on time and by allowing other distributors to encroach into the respondent's exclusive territory. Hence, the loss of profit for 2002 to 2004 is reasonably foreseeable as liable to result from the breach. It was reasonable to contemplate that the appellant's breach of contract by giving late targets for the geographical exclusive areas would result in the respondent's suffering loss and unable to meet the targets as well as channelling their financial resources to meet the targets notices that were in breach of the agreement. The respondent relies on the specific finding of the judge that the appellant had breached cl. 11.1.3 of the distributorship agreement for failing to give 30 days' notice for termination therefore the respondent is entitled to loss of RM27,000 per month and continually. The appellant was aware that the respondent was purchasing as the sole agent in the territories set out and to be sold to the dealers in the area. Thus the loss of profits would be in the contemplation of the appellant. The court awarded this figure as this was the actual loss suffered by the respondent.

[79] The respondent has submitted that the only reason that the respondent suffered loss was the breach by the appellant. If the appellant had not breached the agreement, the respondent would have gained around RM27,000 per month. As such, the argument by the appellant that there was no basis to claim for loss of profit during this period is a non-starter. There was a specific finding by the learned High Court trial judge that it was the appellant who had breached the agreement during the period 2002 to 2004 and this is spelt out in the grounds of judgment. The appellant is estopped from raising the issue that the loss of profit was not caused by the wrongful termination of the distributorship agreement.

[80] The respondent relies on the annual financial statement which states the actual loss of profit is the best evidence to show that the respondent had suffered losses for 2002 to 2004. Thus, the appellant's allegation that there was double compensation and unjust enrichment is without basis.

[81] In *Tham Cheow Toh v. Associated Metal Smelters Ltd* [1972] 1 LNS 153; [1972] 1 MLJ 171 the Federal Court held that the difficulty in assessing damages quoting *Chaplin v. Hicks* [1911] 2 KB 786 does not mean that the damages should not be awarded. On p. 795 Fletcher Moulton LJ said:

> *... I think that, where it is clear that there has been actual loss resulting from the breach of contract, which it is difficult to estimate in money, it is for the jury to do their best to estimate; it is not necessary that there should be an absolute measure of damages in each case. There are no doubt well-settled rules as to the measure of damages in certain cases, but such accepted rules are only applicable where the breach is one that frequently occurs. In such cases the Court weights the pros and cons and*

A *gives advice, and I may almost say directions, to the jury as regards the measure of damages. This is especially the case in actions relating to the sale of goods of a class for which there is an active and ready market. But in most cases it may be said that there is no recognised measure of damages, and that the jury must give what they think to be an adequate solatium under all the circumstances of the case. Is there any such rule as that, where the result of a contract depends on volition of*
B *an independent part the law shuts its eyes to the wrong and says that there are no damages? Such a rule, if it existed, would work great wrong.*

(emphasis added)

[82] The respondent also referred to *Tanjung Tiara Sdn Bhd v. Southwind*
C *Development Sdn Bhd* [2011] 1 CLJ 105; [2011] 4 MLJ 593, where the Court of Appeal affirmed the High Court's award of RM6,747,613.43 as loss of profits based on the computation of 25% of the contract value of RM26,990,453.13 and rejected the defendant's contention that the plaintiff was entitled to nominal damages of RM10 as RM6,747,613.43 was a mere
D estimate. Likewise in *Amar Singh v. Chin Kiew* [1960] 1 LNS 5; [1960] 1 MLJ 77, the Court of Appeal followed what was said by Lord Goddard in the case of *Heatley v. Steel Co of Wales, Ltd* that the court has, in the best way it can, to find a sum of money which it thinks will fairly compensate the family. One judge may arrive at it in one way and another judge in another.

E **[83]** In our considered view, the fact that the High Court Judge already decided that the appellant has breached the distributorship agreement is a non-issue. We also agree that the finding of estimated amount of RM27,000 per month as the basis found by the DR is correct. The crux of the issue before us is whether the High Court Judge was correct in awarding the loss
F of profit for the year 2002 to 2004 or if awarded does it amount to double compensation as submitted by the appellant. Of course the appellant's main contention is that the respondent had failed to prove actual loss and the claim is without legal basis.

[84] We have considered the appellant's submission and we find there is
G some basis in the submission to contend that this claim lacks legal basis. This will be apparent from the simple analysis below which is based on undisputed facts:

(i) The distributorship agreement was entered into on 1 July 2002.

H (ii) The agreement runs on a two-year cycle and shall be deemed as renewed for two years unless terminated.

(iii) The first cycle ended on 30 June 2004. It was then automatically renewed for two years ie, until 30 June 2006.

(iv) The appellant issued a termination notice on 9 July 2004, which was
I held to be unlawful. This was the only breach complained of by the respondent.

(v) The agreement therefore started on 1 July 2002 until its termination in July 2004.

(vi) As such, if there is any claim for loss of profit arising from the unlawful termination, it must be for a claim that accrued after 9 July 2004.

(vii) However, the Registrar expressly found that the loss of profit was for the years 2002 to 2004 ie, during the time when the distributorship agreement was subsisting. This finding was upheld by the learned High Court Judge.

[85] As we have alluded to earlier, in order for the respondent to succeed in a claim for damages, the respondent must show that the loss and damage suffered were caused by the breach. The appellant raised a pertinent question ie, how could the respondent claim for "loss of profit" for the period before the breach took place. The appellant issued a termination notice on 9 July 2004, which was held to be unlawful. This was the only breach complained of by the respondent. We agree with the appellant's contention that when the distributorship agreement was subsisting, the respondent made their profit through their business under the distributorship agreement. This is supported by the notice from Department of Income Tax to the respondent, which is in the record of appeal, showing additional total income of the respondent for the year 2003 to be RM255,162 and respondent is required to pay additional tax. We agree with the appellant that there is no basis to claim for loss of profit during this period. In fact, during this period, there was no breach and therefore claiming for losses is a non-starter.

[86] Clearly, the decisions by the DR and the High Court Judge in allowing the loss of profit claim for years 2002 to 2004 are indefensible. Firstly, there was no causation. This loss of profit for 2002 to 2004, even if any, was not caused by a breach that occurred subsequently on 9 July 2004. This claim does not fall within s. 74 of the Contracts Act 1950. Secondly, there was double compensation. During 2002 to 2004 when the distributorship agreement was still subsisting, the respondent was already making profit thereunder. To allow this loss of profit of RM500,885.97 on top of what the respondent had already earned through its business at that time is clearly double compensation, unjust enrichment, and put the respondent in a much better position than it would have been had the contract been performed. However, we agree that if there is any claim for loss of profit arising from the unlawful termination, it must be for a claim that accrued after 9 July 2004 of which the respondent's claim for loss of profit for the years 2005 to 2006 was allowed at the rate of RM27,000 per month for a total sum of RM648,000. The appellant had conceded to this amount when they abandoned the appeal.

[87] In the circumstances, we are satisfied that the decision of the High Court Judge to affirm the DR's decision to allow loss of profit of RM500,885.97 for 2002 to 2004 (when the distributorship agreement was still in force) is plainly wrong.

[88] Be that as it may, even if any part of the 2004 loss of profit was for the second half of 2004 (ie, after termination), such portion has not been identified or ascertained. We agree with the appellant that until and unless that portion has been identified or ascertained, no assumption can be made there. Ultimately, the burden is on the respondent to prove, which the respondent has failed to discharge.

[89] In the circumstances, it is our considered opinion that the decisions by the DR and the High Court Judge to allow the respondent's claim for profit for 2002 to 2004 were clearly in error. The decisions were contrary to established legal principles and unsustainable at law. Appellate intervention is therefore warranted. The judgment given for this amount ought to be set aside.

Conclusion

[90] In the result, we find merit in part of the appeal by the appellant and our finding is as follow:

(i) The appeal against the loss of goodwill (RM416,800) by the appellant is dismissed;

(ii) The appeal against the loss of profit for the year 2002 to 2004 (RM500,885.97) is allowed;

(iii) The order of the DR and affirmed by the High Court Judge in respect of para. (ii) above is set aside.

[91] It is our unanimous decision that part of the appellant's appeal is allowed with no order as to costs.